NO. 80-1249

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IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1981

NINA DEFOURNEAUX, Administratrix of the Estate of JEROME F. DEFOURNEAUX, JR., Petitioner, vs. STURM, RUGER & COMPANY, INC., a corporation, Respondent.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent does not contest the Petitioner's statement of the issue for review.

OPINIONS BELOW

Respondent stipulates to the opinion of the Second Circuit and the Memorandum of Decision of the District Court as reproduced in the Appendix A of the Petition.

JURISDICTION

Respondent stipulates to the statement of jurisdiction in the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent does not contest the Petitioner's listing of Constitutional and Statutory provisions involved.

STATEMENT OF THE CASE

This is a diversity wrongful death action brought by Petitioner, as administratrix of the Missouri estate of decedent, Jerome F. Defourneaux, on behalf of herself and her minor child. The Complaint sought damages for decedent's death, allegedly resulting from an accidental gunshot wound suffered by decedent while hunting in Missouri, where he resided. Respondent is a Delaware corporation with its principal offices and place of business in Connecticut. It is engaged in the design, manufacture and sale of firearms including the caliber .357 magnum Ruger Blackhawk involved in this accident.

The subject revolver was manufactured in Connecticut and sold to a wholesale distributor in St. Louis, Missouri. Thereafter it was sold or

transferred at least five times, all in Missouri, before Petitioner's decedent purchased it in a private sale in 1975, also in Missouri. On November 13, 1976, in Missouri, Petitioner's decedent dropped the revolver resulting in a fatal discharge.

Petitioner filed her Complaint in the United States District Court for the District of Connecticut against Respondent, Sturm, Ruger & Co., Inc., on November 8, 1978. At that time she was a Missouri resident. The Complaint sought damages for wrongful death and was plead in five counts, including negligence, strict products liability and warranty.

Petitioner's Complaint was filed within the two year limitation period of Connecticut's Wrongful Death Statute, Conn. Gen. Stat. §52-555, but not within

the one year Missouri period of limitation for an action by a surviving spouse or child. Vernon's Mo. Stat. Ann. Sec. 537.080. Respondent moved to dismiss, claiming that a Connecticut court would apply the Missouri wrongful death act, including its integral one year period of limitation, in a case involving the Missouri death of a Missouri resident, allegedly suffered due to a defect in a product purchased in Missouri. By Memorandum of Decision dated April 3, 1980, the District Court, Burns, J., dismissed all counts of the Complaint and judgment entered accordingly on April 10, 1980. On appeal to the United States Court of Appeals for the Second Circuit, the District Court's judgment was reviewed on the transcript of the record, full briefs and oral argument. The Second Circuit Court of Appeals affirmed the District Court's judgment,

holding that a Connecticut court would follow established and traditional Connecticut conflict of law rules under the facts of this case and apply the Missouri statute.

SUMMARY OF ARGUMENT

I. The instant matter is inappropriate for review on writ of certiorari because it is exclusively a state law matter and the role of the federal courts is controlled by Klaxon v. Stentor.

II. The case presents none of the reasons delineated in Supreme Court Rule 17 as appropriate for consideration on writ of certiorari.

III. The judgment below is consistent with the policy considerations of Erie v. Tompkins and does not violate Petitioner's Fourteenth Amendment rights.

IV. The case presents no compelling reason to review Klaxon v. Stentor because the facts indicate that Missouri

law would apply regardless of the particular conflict of laws approach used.

ARGUMENT

I.

The present case is a particularly inappropriate matter for review by this Court on writ of certiorari. Under the facts presented and the decision below, it is exclusively a state law matter where the general issue is that of ascertaining the appropriate Connecticut conflict of law rule to be applied and the particular issue a choice between the wrongful death statutes of two states. Based on a long line of Connecticut choice of law cases, the most recent of which is Gibson v. Fullin, 172 Conn. 407, 374 A.2d 1061 (1977), the District Court properly applied Missouri substantive law to the case. Consistent with the Missouri courts' interpre-

tation of their statute, Vernon's Mo. Stat. Ann. §537.080; State ev rel. Kansas City Stock Yards v. Clark, 536 S.W. 2d 142 (Mo. banc 1976); Edmonsond v. Lakeside Hospital Assoc., 562 S.W. 2d 361 (Mo. banc 1978), the District Court found the one year period of limitation on a surviving spouse's cause of action to be a substantive limitation integral to the cause of action conferred by the statute.

The case presented issues no different, and no more unfamiliar to the District Court, than have literally thousands of post-Klaxon v. Stentor diversity actions. The issue claimed for review by Petitioner was concluded by this Court in 1938 in Klaxon v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477, and Petitioner suggests no persuasive reasons why it should be re-examined.

II.

Nor does the case present any of the issues normally considered by this Court on a writ of certiorari. Petitioner claims no conflict in decisions of the federal courts of appeals. Rather, the only claim is that in applying state conflict of laws rules in diversity cases, there "is a dilemma of conflicting results in many federal court decisions" (Petition, p.9). But this is precisely the sort of conflict that this Court anticipated in Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206, 58 S. Ct. 860, 82 L. Ed. 1290 (1938). Mr. Justice Reed, writing for the Court, noted:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference in opinion in the state courts."

Petitioner fully acknowledges that the conflicting results reached by the federal courts in diversity matters involving conflict of laws analysis are attributable to the varying rules of conflict of laws adopted by the various states. Yet Petitioner has not pressed, nor even significantly addressed, the obvious question of whether uniformity in the federal courts is particularly preferable. The considered balancing of policy objectives evident in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), is completely absent from the instant Petition. In fact, the Petition does not even address the question of why conflict of laws issues should be excepted from the Erie doctrine.

Nor is there any claim that the judgment below conflicts with controlling Connecticut law. Both the District

Court and the Second Circuit expressly applied existing Connecticut law to resolve the conflict of law issue. In Gibson v. Fullin, 172 Conn. 407, 374 A. 2d 1061 (1977), the Connecticut Supreme Court rejected an appeal to abandon Connecticut's traditional 'lex loci delecti' rule in torts conflict of law analysis. Similarly, the Second Circuit held in Patch v. Stanley Works (Stanley Chemical Co. Div.), 448 F.2d 483, 491 (2d Cir. 1971), that, "For choice of law purposes under Connecticut law, a tort is committed not where the wrongful act or omission occurs, but where the injury is sustained." The judgment below, by applying the law of Missouri where the fatal accident occurred, gives full effect to the existing Connecticut conflict of laws rule. Petitioner's only contrary claim is that

the District and Circuit Courts have failed to anticipate an imminent change in existing Connecticut law. Unfortunately, Petitioner feels the winds of change blowing far harder than can be established by a review of recent Connecticut case law.

The last consideration listed in Rule 17 of the Rules of the Supreme Court is also not at issue. There is no claim that either the District Court or the Second Circuit has ruled on a federal question, let alone ruled on a federal question in conflict with, or undetermined by, this Court. The holding of Klaxon v. Stentor, supra; was given full effect by the District and Circuit Courts. Petitioner's only claim is that Klaxon v. Stentor, supra, should be reversed, at least as to "multi-state or bi-state products

liability death cases in diversity actions." (Petition, p.9) Nowhere is it suggested why such 'bi-state products liability death actions' require a different conflict of laws approach than any other diversity action.

III.

Petitioner presses a dual argument in seeking review. First, she argues that application of Klaxon, supra, in diversity death cases has led to 'individuals in their everyday life [being] subject to inconsistent bodies of law.' (Petition, p.11). She claims that this represents "the main evil sought to be remedied under the state of affairs spawned under Swift v. Tyson, 41 U.S. (16 Pet.) 1, 10 L. Ed., 865." (Petition, p.11). Respondent respectfully submits that Petitioner has seriously misread the Court's opinion in Erie v. Tompkins, supra. The Erie

opinion centers not on any alleged "evil" arising from varying state law, but rather on the "mischievous results" of the Swift v. Tyson doctrine in leading to different results depending on whether a suit was filed in federal or state courts.

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. Swift v. Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.
>
> The discrimination resulting became in practice far-reaching..." Swift v. Tyson, supra., pp. 74-75

Petitioner's argument, if accepted, would re-introduce precisely the same discrimination into the current law. Unsatisfied with the substantive law of Missouri and the conflict of laws rules of Connecticut, she urges an historically tried (and failed) doctrine on this Court in hopes of fashioning a third alternative. Petitioner urges this Court to re-introduce and expand the plaintiff's forum shopping by declaring that a District Court is not bound by the forum state's conflict of laws doctrines.

Petitioner candidly admits that the present argument was not advanced before the Circuit Court (Petition, p. 13: "nor has it been argued nor decided below..."). Despite this, she claims that the judgment of the District and Circuit Courts should be reviewed

because it is based on the courts' failure "to employ its prophetic judgment as to what the high court of Connecticut would now do...", (Petition, p.17) and tainted by a finding that the plaintiff's residency was the determinative factor in the outcome. Petitioner is unfortunately incorrect in both assertions. No authority for the assertion that Connecticut law is ripe for change is offered; and the opinions of the District and Circuit Courts, reproduced in Petitioner's Appendix, disclose that the courts considered and expressly rejected plaintiff's claim that "the state law is...ripe for adoption of a modern approach to conflicts." (Petition p.;7). Both courts concluded that the instant matter did not present any justification for predicting a change in Connecticut's established choice of law

doctrine (A-4; A-8). Nor were the decisions below based on Petitioner's residency as the determining factor. Petitioner's residency was considered, as was "the place of the injury" (A-4), and the decedent's residence (A-8). Petitioner's residency was no more than one of three significant factors considered, all of which pointed to the application of Missouri law.

Petitioner's second major argument is styled as a Fourteenth Amendment claim, alleging that consideration of Petitioner's residence violated her right to equal protection of the law. Once again, no authority is cited for the proposition nor are there any convincing arguments in its support. The District Court did not hold that Petitioner was not entitled to the benefit of the Connecticut statute of limita-

tions because she was a non-resident. Rather, the court held that Connecticut law required application of Missouri substantive law to adjudicate the claim of any plaintiff arising from a tort where the injury was sustained in Missouri. Petitioner's residency, the residency of the decedent, the jurisdiction where the decedent's estate was probated and the state where the revolver was purchased were additional factors supporting reference to Missouri law, but not determinative under current Connecticut law. To the extent these factors were considered at all, they were reviewed in the context of whether the instant case presented the 'compelling reason" for review of Connecticut choice of law doctrine that the Connecticut Supreme Court had previously found lacking in Gibson v. Fullin, supra., p. 411.

IV.

Finally, just as the present matter failed to "justify a prediction that a Connecticut court...would overrule that state's long established conflict of law principles" (A-4) in the Circuit Court and failed to present a "compelling reason" in the District Court, it fails to provide even a convincing basis for the review sought in the Petition for Writ of Certiorari. Under the facts presented any modern approach to conflict of laws would refer a forum court to the substantive law of Missouri. There is no doubt that Connecticut's traditional approach of "lex loci delecti" requires reference to Missouri law. Patch v. Stanley Works (Stanley Chemical Co. Div.) 448 F.2d 483, 491 (2d Cir. 1971). Petitioner suggests that Connecticut will soon adopt the

Restatement (Second) "most significant relationship test" (Petition, p. 25; Restatement (Second) Sec. 175, Sec. 178 and Sec. 6 (1971). But were that to be adopted, the facts once again compel reference to Missouri law. A Missouri resident purchased a used handgun in a private sale in Missouri. He took the handgun on a hunting trip in Missouri and suffered a fatal accident there. His estate was probated in Missouri and the Petitioner is the court appointed administratrix of that estate.

A case where the particular rule of conflict of laws to be applied will have no forseeable effect on the expected outcome is poor justification or incentive to re-examine established constitutional case law such as Klaxton v. Stentor, supra. The case cannot practically be limited to bi-state products

liability actions involving wrongful death, as the argument asserted does not depend on the wrongful death nature of the claim. In fact, Petitioner is urging a return to the analysis of Swift v.Tyson, supra.

CONCLUSION

Based on the foregoing arguments, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

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